

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-34446 GFK

*James M. Mulvihill and
Kathleen M. Mulvihill,*

Chapter 13 Case

Debtors.

NOTICE OF HEARING AND MOTION OBJECTING TO CLAIMS OF EXEMPTION

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 11:00 a.m. on October 25, 2004, in Courtroom No. 228B, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Because this motion is being served by mail more than 24 days before the date of the hearing on the motion, any response to this motion must be filed and delivered not later than October 18, 2004, which is seven (7) days before the date of the hearing (including Saturdays, Sundays, and holidays), or filed and served by mail not later than October 15, 2004, which is ten (10) days before the date of the hearing (including Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on July 30, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 522 and Bankruptcy Rule 4003(b). This motion is filed under Bankruptcy Rule 9014 and Local Rules 4003-1, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of the Debtors' claims of exemption to real estate and certain personal property.

6. The Debtors have chosen their exempt property under the exemptions available under 11 U.S.C. § 522(b)(1), the "federal exemptions."

7. Under 11 U.S.C. § 522(b)(1), a debtor is allowed to claim as exempt "property that is specified under subsection (d) of this section, unless the state law that is applicable to the

debtor under paragraph (2)(A) of this subsection specifically does not so authorize.

8. Minnesota has not opted out of the federal bankruptcy exemptions.

9. Among other things, the Debtors have claimed as exempt, on their Schedule C on file herein, the following items:

<u>Property</u>	<u>Exemption statute</u>	<u>Value</u>
Real property used as James M. Mulvihill's homestead	11 U.S.C. § 522(d)(1)	\$ 17,000
Real property used as Kathleen M. Mulvihill's homestead	11 U.S.C. § 522(d)(1)	\$ 900
Kathleen M. Mulvihill's Tort Recovery	11 U.S.C. § 522(d)(11)(E)	46,300
1994 Lincoln Town Car	11 U.S.C. § 522(d)(2)	500
2002 Ford Taurus	11 U.S.C. § 522(d)(2)	20
EROCA Pontoon Boat and motor	11 U.S.C. § 522(d)(5)	5,000

10. Pursuant to 11 U.S.C. § 522(d)(1), a Debtor may exempt "[t]he debtor's aggregate interest, not to exceed \$17,425 (now \$18,450) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence..." 11 U.S.C. § 522(d)(1). (*Emphasis added.*)

11. Based upon the petition, James M. Mulvihill ("Mr. Mulvihill") resides at 921 South Elm Street, Belle Plaine, MN, legally described as Lot Six Block 4, Wildflower Ridge Subdivision #1, Scott County, Minnesota. On Schedule A, the Debtors valued this parcel at \$176,000, and on Schedule D show that it is encumbered by a first mortgage lien in favor of Wells Fargo in the amount of \$146,000 and a second mortgage lien in favor of Wells Fargo in the amount of \$39,000. Based upon the value listed in Schedule A, and the aggregate amount of the liens listed in Schedule D, there is no available equity in the property. .

12. Based upon Scott County property tax information, for 2004, the homestead was valued for tax purposes at \$201,800. A copy of the Scott County property information is incorporated herein and attached hereto as Exhibit A.

13. Using the Scott County valuation, and subtracting the liens encumbering the property, the available equity is \$16,800. On the Debtors' Amended Schedule C filed September 8, 2004, the Debtors claim an equity interest in the Scott County property in the amount of \$17,000 under 11 U.S.C. § 522(d)(1).

14. Based upon the petition, Kathleen M. Mulvihill ("Mrs. Mulvihill") resides at 20529-485th Street, McGregor, MN, legally described as Lot 8, Block 31, Indian Portage, Shamrock Township, Aitkin County, Minnesota, valued at \$117,400 in Schedule A. The Aitkin County Treasurer's Office confirmed that this value is correct for tax purposes for 2004 taxes payable in 2005. According to Schedule D, the property is encumbered by a first mortgage in favor of Wells Fargo in the amount of \$116,500. As such, the Debtors have an equity interest in

this property of at least \$900.

15. It is the Trustee's position that Mr. Mulvihill is limited to claiming his ownership interest in his homestead under 11 U.S.C. § 522(d)(1), and that Mrs. Mulvihill is limited to claiming her ownership interest in her homestead under 11 U.S.C. § 522(d)(1). The extent of the allowable exemption for the Debtors is measured by reference to the plain language of the federal statute, which includes the phrase "uses as a residence" and by reference to the law of the forum state, in this case Minnesota, which requires both ownership and occupancy for a property to be claimed as exempt as a homestead. *Minn. Stat. § 510.01, 510.02. In re Johnson*, 375 F.3d 668 (8th Cir. 2004). To the extent that the Debtors are attempting to claim the entire equity in both parcels of real estate under 11 U.S.C. § 522(d)(1), the Trustee objects to the exemption.

16. Prior to the filing, Mrs. Mulvihill was involved in tort litigation with a defendant identified in Schedules B and C as PFR, and ultimately received a settlement in the amount of approximately \$100,000, from which she is entitled to receive a net settlement amount of 46,300 after deduction of attorneys' fees and estimated federal and state taxes. According to description in Schedules B and C, the basis for the claim was sexual harassment, with damages awarded in the settlement for infliction of emotional distress. The Debtors claim the entire net settlement amount under 11 U.S.C. § 522(d)(11)(E). That portion of the Statute allows an exemption for "a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(d)(11)(E).

17. There is no evidence in the record to show that the entire settlement is attributable to lost future earnings. To the extent that portions of the settlement are attributable to damages other than loss of future earnings, the Trustee objects to the exemption.

18. The settlement appears to be based upon a claim asserted by Mrs. Mulvihill and successfully litigated to a conclusion in her favor. To the extent that Mr. Mulvihill is attempting to claim an interest in her settlement, the Trustee objects to the exemption.

19. It is the Trustee's position that the Debtors are limited to the use of 11 U.S.C. § 522(d)(5) to claim an interest in the homestead occupied by the other party, and that Mrs. Mulvihill is limited to 11 U.S.C. § 522(d)(5) to claim an interest in any portion of the settlement not attributable to lost future earnings.

20. Given the above, the Trustee also objects to exemption of the EROCA Pontoon Boat and motor, as it appears that exemption of this asset causes the Debtors to exceed the allowable amount available under 11 U.S.C. § 522(d)(5).

21. The Debtors amended Schedule C on September 8, 2004, and the meeting of creditors pursuant to 11 U.S.C. § 341(a) was first set, but not concluded, on September 15, 2004, which is a date 30 days or less from the date of the filing of this motion, and, therefore, this objection is timely filed according to Bankruptcy Rule 4003(b).

22. If necessary, the Debtors may be called to testify in connection with this motion.

WHEREFORE, the Trustee moves the court for an order denying the Debtors' claims of exemption, as set forth herein, and such other relief as may be just and equitable.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: September 17, 2004

Signed: /e/ Margaret H. Culp
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
12 South 6th Street, Suite 310
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Margaret H. Culp, employed by the Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: September 17, 2004

Signed: /e/ Margaret H. Culp



Scott County Property Information Search Results

General Property Information

Property ID:	20-058012-0
Roll Type:	Real Estate
Payable Year:	2004
Owner Name:	MULVIHILL,JAMES M & KATHY M
Property Address:	921 ELM ST S
City/State/Zip:	BELLE PLAINE MN 56011
Taxpayer Name:	MULVIHILL,JAMES M & KATHY M
Taxpayer Mailing Address:	
House Address:	921 ELM ST S
City/State/Zip:	BELLE PLAINE MN 56011

Legal Description Information

Lot/Block/Plat#:	6 4 20058
Plat Name:	PLAT-20058 WILDFLOWER RIDGE SUBD #1
Section/Township/Range:	
Deeded Acres:	0.00
Legal Description:	SECT- TWP- RNG-

Miscellaneous Information

School District:	716
Taxing District Code:	1501
Taxing District Name:	BELLE PLAINE CITY

Valuation & Tax Information

EXHIBIT A

(The tax figure shown may or may not be calculated on the total estimated market value as shown. Programs such as This Old House, plat deferment,

limited market value and green acres may reduce the indicated market value to a taxable market value upon which taxes would be calculated.)

Estimated Market Value of Land:	\$40,000
Estimated Market Value of Building:	\$161,300
Estimated Market Value Total:	\$201,300
Total Net Taxes for Current Year:	\$2,127.00
Total Special Assessments Due for Current Tax Year:	\$5.00
Total Net Tax plus Special Assessments:	\$2,132.00
Outstanding Special Assessments:	\$0.00
Payments:	\$1,066.00
Green Acres:	
Ag Preserve:	

Tax Classifications

Property Type:	RESIDENTIAL
Homestead Status:	Y
Exempt Status:	

Sales Information

Last Qualified Sale:	08/31/2001
Amount:	\$187,290.00

Building Characteristics

Type:	RES
Year Built:	2001
Architectural Style:	4 LVL SPLT
Foundation Size (Sq Ft):	1,396
Garage Size (Sq Ft):	636
Bedrooms:	3
Bathrooms:	2.50

CRV Search | Property Tax Estimator
Property Tax Statement

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FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the Debtors in their verified Schedules and Statements on file and of record herein.

LEGAL DISCUSSION

1. The homestead exemption claim must be disallowed.

The Debtors are attempting to claim the entire equity in two homesteads, one occupied by Mr. Mulvihill and the other occupied by Mrs. Mulvihill under the federal exemption, 11 U.S.C. § 522(d)(1). The federal homestead exemption is limited to a total of \$18,450 in property that the debtor "uses as a residence." 11 U.S.C. § 522(d)(1). It is the Trustee's position that each of them may only claim an interest in the property each of them actually occupies as a residence, within the exemption limit set forth under the Statute. Their ability to claim a homestead exemption is also measured by Minnesota law, which requires that a debtor both "own and occupy" the property in order to claim it as exempt from the claims of creditors. *Minn. Stat. § 510.01, 510.02. In re Johnson*, 375 F.3d 668 (8th Cir. 2004). The Trustee objects to the claimed homestead exemption and moves the Court for entry of an order disallowing the claimed homestead exemption.

2. The claim for exemption of the entire net tort recovery must be disallowed.

The Debtors are attempting to claim an entire net tort recovery received by Mrs. Mulvihill after successful litigation on a claim of sexual harassment. The description of the damages included in Schedules B states that her damages were attributable to infliction of emotional distress. The provision of the federal exemption statute selected by the Debtors allows an exemption "a payment in compensation for loss of future earnings." 11 U.S.C. § 522(d)(11)(E). To the extent that elements of the settlement award are attributable to factors other than a payment in compensation for loss of future earnings, the Trustee objects to the exemption on that basis, and moves the Court for entry of an order disallowing the claimed exemption for the entire net settlement amount. The Trustee does not object to a claim for any

portion of the settlement not attributable to payment for loss of future earnings under 11 U.S.C. § 522(d)(5), to the extent allowable under that portion of the federal statute.

Based upon Schedule C, it appears that Mr. Mulvihill is attempting to claim an interest in the tort recovery of Mrs. Mulvihill. There is nothing in the record that supports his claim of exemption for this asset. The Trustee objects to exemption of any portion of the settlement by Mr. Mulvihill, and moves the Court for entry of an order disallowing this exemption.

3. The Debtors' claims of exemption exceed the allowable amount under 11 U.S.C. § 522(d)(5).

Assuming that Mr. Mulvihill would claim the maximum allowable amount available to him under 11 U.S.C. § 522(d)(1) to exempt his equity in his residence, or \$16,800, the amount of exemption available to him under 11 U.S.C. § 522(d)(5) is \$2,625. If the EROCA Pontoon Boat and motor is valued at \$5,000 and is owned jointly by the Debtors, he is limited to an exemption of his interest in this asset, or no more than \$2,500. The remaining \$125 could be applied to exemption of any other property.

Assuming that Mrs. Mulvihill would claim the maximum allowable amount available to her under 11 U.S.C. § 522(d)(1) to exempt her equity in her residence, or \$450, the amount of exemption available to her under 11 U.S.C. § 522(d)(5) is \$10,225. That amount would be available for her to exempt any portion of net settlement on the pre-petition sexual harassment litigation not attributable to payment for loss of future income, and her equity in the EROCA Pontoon Boat.

CONCLUSION

Based upon the foregoing, the Trustee's objection to claimed exempt property should be sustained.

WHEREFORE, the Trustee moves the Court for entry of an order sustaining her objection.

September 17, 2004

Respectfully submitted:

Jasmine Z. Keller, Trustee

Signed: /e/ Margaret H. Culp

Thomas E. Johnson, #52000

Margaret H. Culp, #180609

12 South Sixth Street, Suite 310

Minneapolis, MN 55402

Counsel for Chapter 13 Trustee

612-338-7591

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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on September 17, 2004, I served Notice of Hearing and Motion Objecting to Claim of Exemption, and proposed Order, on the individual(s) listed below, in the manner described:

By electronic means:

United States Trustee
612-664-5616
Paul E. Ross, Esq.
952-496-1728

By first class U.S. mail, postage prepaid:

Paul E. Ross, Esq.
287 Marschall Road, Suite 203-A
Shakopee, MN 55379

James M. Mulvihill
921 South Elm Street
Belle Plaine, MN 56011

Kathleen M. Mulvihill
20529-485th Street
McGregor, MN 55760

William J. Egan, Esq.
5200 Willson Road
Edina, MN 55424

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: September 17, 2004

/e/ Margaret H. Culp

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ORDER DENYING EXEMPTION CLAIM

At St. Paul, MN, _____, 2004.

The above-entitled matter came before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to the Debtors' claims of exemption by both Debtors for \$17,000 in equity in real property used as a homestead by Debtor James M. Mulvihill, together with an exemption for \$900 in equity in real property used as a homestead by Debtor Kathleen M. Mulvihill, under 11 U.S.C. § 522(d)(1), a net sexual harassment settlement in favor of Debtor Kathleen M. Mulvihill for \$46,300 under 11 U.S.C. § 522(d)(11)(E), and personal property valued at \$5,000 under 11 U.S.C. § 522(d)(5).

Appearances, if any, were noted in the minutes.

Upon the foregoing record,

IT IS ORDERED:

The Trustee's objection to the Debtors' claims of exemption is **SUSTAINED**.

Dated _____, 2004.

Gregory F. Kishel
Chief United States Bankruptcy Judge